IN THE SEYCHELLES COURT OF APPEAL

W.LARUE — APPELLANT

V.

THE REPUBLIC — RESPONDENT

Criminal Appeal No. 2 of 1990

A. Derjacques for appellant

T. Fernando for Republic

JUDGMENT OF THE COURT

The appellant was charged in the Supreme Court with an offence contrary to section 217 of the Penal Code the particulars of which alleged that on 20th April, 1990, he, by means calculated to choke and with intent to commit a felony namely indecent assault on a girl under 15 years of age, attempted to render Olivette Finesse incapable of resistance. There was an alternative count of indecent assault on a girl under 15 years of age contrary to section135(1) and (2) of the Penal Code. He was convicted of the offence of disabling in order to commit a felony contrary to section 217 of the Penal Code by Alleear J., and was sentenced to 6 years imprisonment. The alternative count of indecent assault was left on the file.

Briefly the facts are as follows. The complainant is 13 years old and a half sister of the appellant who is 26 years old and who had been a member of the armed forces for 8 years. At the material time the appellant was unemployed and was living with his mother, stepfather and half sister in his parents' house which is in an isolated area. He was sent out to some nearby dense woodland to collect coconuts on the material morning accompanied by the complainant. It was in an isolated area. According to the complainant the appellant made advances to her and she became frightened. The appellant

neck from behind with one hand and pulled her down on to a trench. She fell on her back with the appellant still gripping her neck with one hand. The appellant pulled off her knickers and inserted a finger in her vagina. Still gripping her by the neck he told her to open her legs and to touch his penis. He exerted stronger pressure on her neck to make her comply with his demands resulting in her foaming or frothing at the mouth. The complainant then pretended to acquiesce. She got a momentary respite and ran off. The appellant pulled at her skirt but she managed to escape. She ran straight home to her mother P.W.5 Berthe and told her what had happened. She was dirty, her dress was torn and she had no knickers. P.W.5. Berthe testified that when the complainant reached home that morning, the complaint's eyes were red, her face swollen and there were scratches under her neck. Her clothes were muddy and dirty and torn. P.W.5 Berthe was preparing to take the complainant to the Police Station to make a report when the appellant turned up. Berthe upbraided the appellant, but the appellant denied that he had sexually assaulted the complainant at all.

A report was duly made at the Police Station, and the complainant was medically examined by two doctors the same day one of whom was a gynaecologist. One doctor found nail markings on the complainant's chest, face and neck. The gynaecologist found scratches on the left cheek and on both the left and right sides of her neck. There were some scratches on the external of the vagina, but the hymen was intact. There was a contusion on the inside of the vagina lip. The gynaecologist was asked:

> "If somebody is being held at the side of the neck and where the contusions were found by yourself, could this have incapacitated a person being so held?."

His reply was -

> "It all depends on the aggressor. If pressure is exerted

by an adult on a victim of 13 years then you might be able to succeed in strangulating that person. But that depends on the age of the aggressor and the age of the victim."

The trial judge found the complainant's testimony clear, composed and candid. He said that despite a rigorous cross examination the complainant was steadfast and unshaken in her evidence. He was satisfied that she had told the truth without any re servation. Prior to her giving testimony the trial judge examined her in a series of questions and discovered that she did not know the nature of an oath. He sent her to a Catholic priest to be instructed upon the nature of an oath and when she returned to Court after such instruction she stated that she knew the nature of an oath. She was attending classP8 in school, knew the duty of speaking the truth and would be 14 year old in 3 months' time. The trial Judge was satisfied that she was a competent witness and could give sworn testimony. She was duly sworn. There was a ground of appeal directed to the admission of her sworn evidence because of her age, but we are satisfied that in the circumstances that ground is without substance.

The trial judge reviewed the evidence of the appellant and rejected it completely. He warned himself of the danger of accepting the sworn and uncorroborated evidence of a girl of 13 years of age, but he was fully satisfied that the complainant's version was true and he was prepared to act on it alone to convict. However he found some support of the complainant's evidence in the fact that at the material time and date she and the appellant were alone together in a remote woodland area with nobody else in sight. He believed the molester of the complainant could only be the appellant.

The appellant is appealing against both conviction and sentence. Mr. Derjacques for the appellant contended before us that the trial judge had failed to direct himself adequately on the need of mens rea and had erred in holding that the appellant had the intention to render the complainant incapable of resistance and in holding that the appellant had the intention to choke the complaintnt. The relevant portion of sec. 217 of the Penal Code reads -

> "Any person, who by any means calculated to choke, suffocate or strangle, and with intent to commit .....a felony..... renders or attempts to render any person incapable of resistance, is guilty ....."

The intent relates to the commission of the felony, not the choking or strangulation. Here indecent assault was intended and indeed committed. There was a calculated attempt to choke or strangle the complainant, to render her incapable of resistance. The testimony of the gynaecologist referred to earlier on would support this. Mr. Derjacques' argument is that the appellant was a trained soldier, and he could easily, if he had so wanted, have rendered the complainant incapable more effectively. He referred to the minor injuries suffered by the complainant and contended that the appellant had, in fact, taken no action calculated to choke, strangle or suffocate the complainant. He pointed out that only the sides of the complainant's neck were held in a one hand grip and no pressure had been applied to her trachea region. There however was evidence that the appellant had held the complainant in a neck grip for some period of time in the course of which the complainant had foamed or frothed at the mouth and that action was a calculated attempt to render the complainant incapable of resistance to his indecent advances,

Mr. Derjacques submitted that in view of the comparatively minor injuries sustained by the complainant the assault must have been a simple one, and a lesser charge should be substituted. We cannot agree. We think there was evidence on which the trial judge could arrive at the conclusion he did.

The sentence of 6 years is severe, but not manifestly so. The appeal is dismissed in its entirety.

..... A. Mustafa
President

..... H. Goburdhun
Justice of Appeal

..... P.T. Georges
Justice of Appeal

14th October, 1991